

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Winston Broadcasting Network, Inc.)	Facility I.D. No. 72958
Licensee of Station WBNX-TV)	NAL/Acct. No. 0941420002
Akron, Ohio)	FRN: 0003775640

**NOTICE OF APPARENT
LIABILITY FOR FORFEITURE**

Adopted: October 6, 2008

Released: October 14, 2008

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”) issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the “Act”), and Section 1.80 of the Commission’s Rules (the “Rules”),¹ by the Chief, Video Division, Media Bureau pursuant to authority delegated under Section 0.283 of the Rules,² we find that Winston Broadcasting Network, Inc. (the “Licensee”), licensee of Station WBNX-TV, Akron, Ohio (the “Station”), apparently willfully and repeatedly violated Section 73.670 of the Rules, by failing to comply with the limits on commercial matter in children’s programming.³ Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of twenty thousand dollars (\$20,000).

II. BACKGROUND

2. In the Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children’s programming, and to consider in its review of television license renewal applications the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, which limits the amount of commercial matter which may be aired during children’s programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a “program-length commercial”).⁴ In addition, the Commission reiterated its long-standing policy against “host-selling,” *i.e.*, “the use of program talent to deliver commercials,” including “endorsements

¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

² See 47 C.F.R. § 0.283.

³ See 47 C.F.R. § 73.670.

⁴ *Children’s Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

or selling by animated cartoon characters as well as ‘live’ program hosts.”⁵

3. On June 1, 2005, the Licensee filed its license renewal application (FCC Form 303-S) for Station WBNX-TV (the “Application”) (File No. BRCT-20050601CLV). In response to Section IV, Question 5 of the Application the Licensee stated that, during the previous license term, the Station failed to comply with the limits on commercial matter in children’s programming specified in Section 73.670 of the Rules. In Exhibit 19 and in a June 4, 2007 amendment to the Application, the Licensee indicated that between February 3, 1998, and August 5, 2003, the Station violated the children’s television commercial limits on eight occasions. Of these overages, one was 15-seconds in duration, one was 30-seconds in duration, five were characterized as host-selling violations, and one was characterized as a program-length commercial violation. The Licensee asserted that the 15-second overage occurred as a result of a computer software problem at the WB Network’s technical facilities, and it attributed the 30-second overage to a last minute, unforeseen schedule change. The Licensee attributed the host-selling violations and program-length commercial violation to human error and/or inadvertence.

4. The Licensee also reported that on ten occasions, the Station aired a commercial for a Nintendo Gameboy video game during the “Pokemon” program. The Licensee indicated that the commercial contained an image of three “Pokemon” cards among a six-card fan for “slightly” more than one second. According to the Licensee’s description, only half of the letter “M” and the letters “ON” of “Pokemon” were visible. The Licensee stated that no “Pokemon” characters were visible and the audio portion of the commercial made no reference to “Pokemon.” The Licensee asserted that children viewing the commercial would not perceive any linkage between the “Pokemon” program and the Gameboy commercial. The Licensee contended that the Station was unaware of the “fleeting image” in the commercial until October 8, 2002 when it received a memo from the WB Network.

5. The Licensee described the remedial measures taken to prevent future violations of the commercial limits. Moreover, it indicated that between September 4, 2003, and September 21, 2003, it removed from its children’s programming schedule “four half-hours” worth of commercials and replaced that time with public service announcements and promotions of educational and informational children’s programs. Finally, the Licensee argued that its Application demonstrates its “wealth of children’s programs” and other “special nonbroadcast efforts it has taken to promote the educational and informational needs of children” and requested that the Commission take into account these “extraordinary efforts” in considering the Station’s commercial overages.

III. DISCUSSION

6. Station WBNX-TV’s record during the last license term of exceeding the Commission’s commercial limits constitutes an apparent willful and repeated violation of Section 73.670. We note that eleven of the overages were program-length commercials.⁶ With respect to the Station’s broadcast of the

⁵ *Id.* at 2127 n. 147, 6 FCC Red at 5097; *see also Action for Children’s Television*, 50 FCC 2d 1, 8, 16-17 (1974).

⁶ As discussed above, the Licensee attributed a 15-second overage to a computer software problem at the WB Network’s technical facilities. In *Children’s Television Programming*, the Commission specifically recognized that licensees may experience “occasional emergency scheduling change[s],” which would be taken into consideration in determining whether “extenuating circumstances” mitigated any resulting children’s television commercial limits violations. 6 FCC Red at 2126 n.123. On reconsideration, the Commission affirmed this policy, stating that “where the facts demonstrate that a slight overage is caused by a last-minute emergency scheduling change, we will consider such a lapse to be ‘*de minimis*.’” *Children’s Television Programming (Recon.)*, 6 FCC Red at 5096. Although the 15-second overage did not involve a last-minute emergency scheduling change, we believe the technical problem which caused it constitutes an extenuating circumstance. Accordingly, this overage shall be considered *de minimis*, and shall not be considered in determining the sanction deemed appropriate for the other violations of the children’s television commercial limits reported by the Licensee.

commercial for the Nintendo Gameboy video game, the Licensee contended that the “Pokemon” game cards appeared for “slightly” more than one second during the commercial. However, it is well-established that the determination as to whether a particular program is a program-length commercial is not dependent on the duration of the appearance of the program-related product in the commercial announcement. The Commission has stated on numerous occasions that, where a commercial announcement includes a product related to the program in which the commercial is broadcast, then the program is a program-length commercial regardless of the duration of the appearance of the program-related product in the commercial.⁷ Moreover, we believe that, in the context of the cognitive abilities of young children, there is the potential for confusion between the Gameboy commercial and the “Pokemon” program regardless whether any “Pokemon” character is displayed given the image of a “Pokemon” game card contained in the commercial and the consequent likelihood that children may associate it with the program. Further, we do not believe that the other factors noted in the Application are a mitigating circumstance in this case.

7. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.⁸ Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.⁹ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁰ and the Commission has so interpreted the term in the Section 503(b) context.¹¹ Section 312(f)(2) of the Act provides that “[t]he term ‘repeated,’ when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”¹²

8. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs.¹³ Given this congressional concern, the Commission made it clear that program-length commercials, by their very nature, are extremely serious violations of the children’s television commercial limits, stating that the program-length commercial policy “directly addresses a fundamental regulatory concern, that children who have difficulty enough distinguishing program content from unrelated commercial matter, not be all the more confused by a show that interweaves program content and commercial matter.”¹⁴

9. The number and magnitude of overages at issue here mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted

⁷ *UTV of San Francisco, Inc. (KBHK-TV)*, 10 FCC Rcd 10986, 10988 (1995); see also *WPIX, Inc.*, 14 FCC Rcd 9077 (MMB 1999) (commercial for “Spirit of Mickey” home video showing brief image of Donald Duck on cover of video aired during “Quack Pack” program); *Act III Broadcasting License Corp. (WUTV(TV))*, 10 FCC Rcd 4957 (1995), *aff’d*, 13 FCC Rcd 10099 (MMB 1997) (commercial for a fast food restaurant promoting a trip to Disney World as a contest prize contained a brief image of Goofy and aired during the program “Goof Troop”).

⁸ 47 U.S.C. § 503(b)(1)(B); see also 47 C.F.R. § 1.80(a)(1).

⁹ 47 U.S.C. § 312(f)(1).

¹⁰ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹¹ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹² 47 U.S.C. § 312(f)(2).

¹³ S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989).

¹⁴ *Children’s Television Programming*, 6 FCC Rcd at 2118.

the Children's Television Act of 1990.¹⁵ The reasons the Licensee cited for the host-selling and program-length commercial violations, inadvertence and human error, do not mitigate or excuse them. The Commission has repeatedly rejected inadvertence and human error as bases for excusing violations of the children's television commercial limits.¹⁶ Nor does the Licensee's implementation of policies to prevent subsequent violations of the Commission's children's television rules and policies relieve it of liability for violations which have occurred.¹⁷

10. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$8,000 for violation of Section 73.670.¹⁸ In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁹

11. In this case, an upward adjustment is justified in light of the number and nature of the commercial overages. Accordingly, we find that the Licensee is apparently liable for a forfeiture in the amount of \$20,000 for its apparent willful and repeated violation of Section 73.670.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that Winston Broadcasting Network, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of twenty thousand dollars (\$20,000) for its apparent willful and repeated violation of Section 73.670 of the Commission's Rules.

13. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, Winston Broadcasting Network, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

14. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank-Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank:

¹⁵ *Id.* at 2117-18.

¹⁶ See, e.g., *LeSea Broadcasting Corp. (WHKE(TV))*, 10 FCC Rcd 4977 (MMB 1995); *Buffalo Management Enterprises Corp. (WIVB-TV)*, 10 FCC Rcd 4959 (MMB 1995); *Act III Broadcasting License Corp. (WUTV(TV))*, 10 FCC Rcd 4957 (MMB 1995); *Ramar Communications, Inc. (KJTV(TV))*, 9 FCC Rcd 1831 (MMB 1994).

¹⁷ See, e.g., *WHP Television, L.P. (WHP-TV)*, 10 FCC Rcd 4979, 4980 (MMB 1995); *Mountain States Broadcasting, Inc. (KMSB-TV)*, 9 FCC Rcd 2545, 2546 (MMB 1994); *R&R Media Corporation (WTWS(TV))*, 9 FCC Rcd 1715, 1716 (MMB 1994); *KEVN, Inc. (KEVN-TV)*, 8 FCC Rcd 5077, 5078 (MMB 1993); *International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969).

¹⁸ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

¹⁹ 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01; 47 C.F.R. § 1.80(b)(4); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section II.

TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code).

15. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Barbara A. Kreisman, Chief, Video Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

16. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

17. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁰

18. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Winston Broadcasting Network, Inc., 2690 State Road, Cuyahoga Falls, Ohio 44223, and to its counsel, Mark J. Prak, Esquire, Brooks Pierce McLendon Humphrey & Leonard, LLP, P.O. Box 1800, Raleigh, North Carolina 27602.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

²⁰ See 47 C.F.R. § 1.1914.